

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3951

Appeal PA18-127

Ministry of Labour

May 7, 2019

**Summary:** The Ministry of Labour (the ministry) received a request under the *Freedom of Information and Protection of Personal Privacy Act (FIPPA, or the Act)* from the mother of a worker who was found deceased. The request was for any and all witness statements taken in relation to (what the ministry describes as) the workplace fatality investigation into the appellant's son's death, made under the *Occupational Health and Safety Act*. The ministry identified two responsive records, the audio recordings of two employees' interviews. Each employee provided their consent to disclose the written transcript of the record relating to their interview for compassionate reasons. The ministry fully disclosed the transcripts, but withheld the audio records on the basis of the mandatory personal privacy exemption at section 21(1) of the *Act*. The appellant appealed the ministry's decision. During the inquiry, the adjudicator identified that the records appear to contain the personal information of the appellant, raising the possible application of the discretionary personal privacy exemption at section 49(b) of the *Act* rather than the mandatory section 21(1) exemption. In this order, the adjudicator finds that the exception at section 21(4)(d) (compassionate grounds) applies to the records, and therefore, the records are not exempt under section 49(b). Accordingly, the ministry is ordered to disclose the records to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definitions of "personal information" and "close relative"), 2(2), 2(3), 21(3)(b), 21(4)(d), and 49(b).

**Orders Considered:** Orders PO-3273, PO-2518, PO-2524, PO-2850, PO-3212, MO-2075, MO-2237, MO-2387, MO-2919, and MO-3699.

## **OVERVIEW:**

[1] The appellant is the mother of an individual who lost his life in (what the ministry describes<sup>1</sup> as) a workplace fatality. The day after the appellant's son passed away, the Ministry of Labour (the ministry) conducted an investigation under the *Occupational Health and Safety Act (OHSA)*, and interviewed two members of management of the workplace in question.

[2] The appellant requested any and all individual statements taken by the ministry in relation to her son's death, under the *Freedom of Information and Protection of Personal Privacy Act (FIPPA, or the Act)*.

[3] The ministry identified two interviews in response to the request.

[4] Pursuant to section 28 of the *Act*, the ministry notified the two affected parties whom the ministry had interviewed. The ministry obtained their consent to disclose the transcripts of their witness statements to the appellant, with the exception of certain personal information such as their contact information and birth dates.

[5] The ministry then issued a decision granting full access to the written transcripts of the witness statements. However, the ministry denied access to the audio recordings of the witness statements, relying on the mandatory personal privacy exemption at section 21 of the *Act* to do so.

[6] The requester, now the appellant, appealed the ministry's decision.

[7] During mediation, the appellant stated that she believed she should receive the audio recordings based on compassionate grounds (under section 21(4)(d) of the *Act*) and based on fair determination of rights (under section 21(2)(d) of the *Act*), as she was contemplating legal action. The ministry stated that it had considered compassionate grounds in making its access decision regarding the full release of the transcripts. In an effort to gain their consent to disclose the requested audio records, the affected parties were contacted again, but neither consented to disclosure.

[8] Further mediation was not possible, and the appellant advised the mediator that she would like to have this appeal proceed to adjudication.

[9] I began my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the ministry and affected parties. The ministry and affected parties provided written representations in response. I then sought and received representations from the appellant. Upon my further review of the records, I noted that the records appear to contain the personal information of the appellant.

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<sup>1</sup> The ministry's initial representations in this inquiry.

Therefore, I provided the ministry and the affected parties with an opportunity to provide any additional or amended written representations about the possible application of personal privacy exemption at section 49(b) of the *Act*. The ministry provided representations in response, but the affected parties did not. As the records also include the personal information of the appellant's husband, I sought consent from him to the disclosure of his personal information, and he provided it.<sup>2</sup>

[10] For the reasons that follow, I order the ministry to disclose the records to the appellant, in full, on compassionate grounds, in accordance with section 21(4)(d) of the *Act*.

### **RECORDS:**

The two records at issue are the audio recordings of the witness statements of two individuals.

### **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?

### **DISCUSSION:**

#### **Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[11] The ministry withheld the records on the basis of the mandatory personal privacy exemption at section 21(1) of the *Act*. As mentioned, since it appeared to me that the records contained the appellant's personal information, I raised the possible application of the discretionary personal privacy exemption at section 49(b) of the *Act*, as opposed to the mandatory exemption in section 21(1), which can only apply if the records do not contain the appellant's personal information.

[12] In order to determine if section 49(b) applies, I must first decide whether the

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<sup>2</sup> This office was not able to ascertain the contact information of the wife and sister of the deceased to provide notice. However, as noted later in these reasons, the minimal amount of their personal information is known to the appellant through the disclosure already made to her.

records contain “personal information,” and if so, to whom it relates.

[13] The term “personal information” in section 2(1) of the *Act* means “recorded information about an identifiable individual.” Section 2(1) also lists examples of “personal information” (such as name,<sup>3</sup> age,<sup>4</sup> family status,<sup>5</sup> and views or opinions<sup>6</sup>), but the listed examples are not exhaustive. Therefore, information that does not fall under the listed examples may still qualify as personal information.<sup>7</sup>

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>8</sup>

[15] Having reviewed both records at issue, and for the following reasons, I find that they each contain personal information, as defined under section 2(1) of the *Act*, belonging to several identifiable individuals.

### ***Personal information of the appellant***

[16] This office has held that the correct approach to determining whether a record contains a requester’s information is to review the entire record, not only the portions remaining at issue.<sup>9</sup> This record-by-record analysis is significant because it determines whether access to the information at issue must be reviewed under section 21(1) in Part II of the *Act*, or under section 49(b) in Part III of the *Act*.<sup>10</sup> The existence of a requester’s personal information in the records would give her a higher right of access to them than if the records did not contain her personal information. It may also be relevant to the analysis of any rights of access she may have under compassionate grounds.

[17] Applying this record-by-record approach, and based on my review of the records, I find that each of the records contains the appellant’s personal information, as defined under the *Act*. Although she is not identified by name, her name is only one type of identifying information possible. In one record, the appellant is referred to as [her husband’s] wife, and in the other one, I find that the reference to “the family [other than the father of the deceased],” necessarily includes her as the mother of the deceased. I find that these references clearly refer to the appellant and constitute her personal information under the introductory wording of the definition of that term, and

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<sup>3</sup> Section 2(1) (definition of “personal information”), paragraph (h).

<sup>4</sup> Ibid, paragraph (a).

<sup>5</sup> Ibid

<sup>6</sup> Ibid, paragraphs (e) and (g).

<sup>7</sup> Order 11.

<sup>8</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>9</sup> See, for example, Order MO-2237

<sup>10</sup> Order M-352.

under paragraph (a) of that definition.

[18] Given these references to the appellant in the records, I do not accept the ministry's position that it "cannot confirm or deny" whether the records contain the appellant's personal information, or that there may be ambiguity about this question ("in the event that [the records] are considered to contain [her] personal information . . .").

[19] I also do not accept the ministry's submission that the appellant has already been provided with full access "to any personal information that may relate to her," in the transcripts. The fact that the appellant has received a transcript of these records does not detract from the existence of her personal information, as defined in the *Act*, in the records at issue, which are separate from the transcripts.

### ***Personal information of the deceased***

[20] The records are about the deceased and mention him by name. Because he has not been deceased for more than thirty years, the recorded information about him in the records constitutes his personal information within the meaning of the *Act*.<sup>11</sup>

### ***Personal information of the affected party witnesses***

[21] To qualify as personal information, the information must be about the individual in a personal capacity. The affected parties whose statements make up the records were the supervisors of the deceased. They were interviewed by the ministry because the deceased died while at work.

[22] Section 2(3) of the *Act* relates to the definition of personal information, and says:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[23] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>12</sup> If the information at issue does not take on that personal element, it cannot be subject to the personal privacy exemption, and it would be ordered disclosed if no other exemptions apply to it. However, if the disclosure of the information would reveal something of a personal nature about the individual, it may still qualify as personal information even if information relates to an individual in a professional, official or business capacity.<sup>13</sup>

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<sup>11</sup> Section 2(2) of the definition of "personal information" under the *Act*.

<sup>12</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>13</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

Where an employee's conduct is called into question, such as through a formal investigation, this office has found that that information may qualify as "personal information" under the *Act*.<sup>14</sup>

[24] The records contain information about the two affected parties who were interviewed by the ministry, as well as other employees and/or contractors. I find that the information about employees other than those interviewed by the ministry is business information, even where it refers to any contact made with them by the interviewed affected parties in relation to the deceased, or by the deceased himself. These other employees/contractors are not mentioned in the records because of any investigation into their own conduct, unlike the interviewed employees themselves. Whether the records contain the personal information of the interviewed affected parties requires further discussion, because of the context in which their statements were taken. This is explored below.

#### *Representations of the affected parties*

[25] The affected parties did not explain why their statements, taken as part of an investigation into their employee's workplace fatality, should be considered their personal information, as defined under the *Act*.

[26] Rather, they asserted that they did not consent to the disclosure of the audio recordings of their witness statements. (I will address their other submissions later in this order.)

[27] The interviewed affected parties also asked that if I order disclosure of the audio records, that "any personal information be deleted." This appears to be a reference to their contact information, birth dates, and licence plate numbers, given the ministry's representations with respect to the "personal information" that the affected parties had not agreed to disclose at the request stage. Since that kind of information was not included in the audio, that information is not at issue in this appeal.

[28] I acknowledge the employment-related context of the creation of these records, and the reasons why the individuals were interviewed (their professional relationships with the deceased). However, since the record was created as part of an investigation into whether there had been a violation of the *Occupational Health and Safety Act*, I find that the views or opinions expressed by these employees consist of their personal information under the *Act*.<sup>15</sup> As noted above, where professional conduct is under review, the information at issue can take on a much more personal element.<sup>16</sup> In the

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<sup>14</sup> See, for example, Order PO-2524

<sup>15</sup> Paragraph (e) and the introductory wording of section 2(1) of the *Act* (the definition of "personal information").

<sup>16</sup> Order PO-2524

circumstances of this appeal, I find that the fact of these employees' involvement in an investigation into their employee's death is their personal information too.<sup>17</sup>

*Representations of the ministry*

[29] Having found that the records contain the personal information of the two employees who were investigated by the ministry, I will briefly address the ministry's representations on this issue.

[30] I do not accept the ministry's submission that the sex and family status of these affected parties are their personal information in these records. To do so would mean that the names and/or titles of many individuals acting in a professional capacity would constitute their personal information if their sex and/or family status could be revealed by their names and/or titles. Section 2(3) of the *Act* specifically excludes professional contact information on its own. In this case, the sex of these affected parties could be known by their names.

[31] What I do accept is the ministry's submissions that the records contain the personal information of these affected parties in the form of their voices, and their views or opinions, in the course of an investigation that covered their professional conduct. I do so because of the personal element of the audio of these interviews, as discussed above, and not simply because the voices of these individuals are distinct to them, as argued by the ministry. This office has previously held that the audio of a person speaking in their professional capacity is not necessarily their personal information.<sup>18</sup> In this case, however, I find that the audio of the interviews contains personal information, for the reasons I have set out above.

***Personal information of other family members, apart from the deceased***

[32] I find that both records also contain the personal information of the father, the wife, and the sister of the deceased. The personal information of these individuals falls under the introductory wording of the definition of that term, and under paragraphs (a), (b), (e), (g) and/or (h) of the definition.

***Conclusion***

[33] Because I have found that the records contain the personal information of the appellant and other identifiable individuals, I must consider whether the discretionary personal privacy exemption at section 49(b) of Part III of the *Act* applies.

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<sup>17</sup> By analogy from cases relating to involvement with the criminal justice system, as discussed in Order PO-2518.

<sup>18</sup> Order MO-3699.

**Issue B: Does the discretionary exemption at section 49(b) apply to the information at issue?**

[34] For the reasons that follow, I find that the exception at section 21(4)(d) (compassionate grounds) applies to the records in this appeal. This means that the records are not exempt from disclosure under the personal privacy exemption at section 49(b) of the *Act* because disclosure would not constitute an unjustified invasion of the personal privacy of affected parties.

[35] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[36] Under section 49(b), if a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[37] Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[38] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an "unjustified invasion of personal privacy."

***Do any of paragraphs 21(1)(a) to (e) apply?***

[39] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[40] In this appeal, none of the parties have argued that any of the paragraphs at section 21(1)(a) to (e) apply. On my review of the records, I find that none of those paragraphs apply except with respect to the appellant's husband. Since he consented to his personal information being disclosed, paragraph 21(1)(a) applies to his personal information and disclosure of his personal information would not be an unjustified invasion of his personal privacy under section 49(b).

***Does section 21(3) apply?***

[41] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and



balance the interests of the parties.<sup>19</sup>

*The presumption at section 21(3)(b) presumptions applies*

[42] If any of the presumptions listed at paragraphs (a) to (h) of section 21(3) apply in a section 49(b) case, the application of that presumption becomes a factor not favouring disclosure. The weight to be given that factor will depend on the circumstances of the case.

[43] The ministry submits, and I find, that the presumption at section 21(3)(b) (investigation into possible violation of law) applies in this case. The ministry submits, and I find, that the records contain personal information that was compiled as part of an investigation into a possible violation of the *Occupational Health and Safety Act*. The presumption at section 21(3)(b) can apply to a variety of investigations, including those relating to occupational health and safety laws.<sup>20</sup> Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>21</sup>

[44] In this case, I assign this presumption only moderate weight because there is no evidence before me that the ministry's investigation is ongoing or that there has been any finding against the affected parties.<sup>22</sup>

[45] fact that the presumption at section 21(3)(b) applies is not determinative. It may be overcome by the application of section 21(4)(d) (compassionate grounds).

***Does section 21(4)(d) apply?***

[46] Despite the application of section 21(3)(b), if section 21(4)(d) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[47] Section 21(4)(d) says:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it, [ . . . ] discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

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<sup>19</sup> Order MO-2954

<sup>20</sup> Orders PO-1706 and PO-2716

<sup>21</sup> Orders P-242 and MO-2235.

<sup>22</sup> Order MO-2237.

[48] A finding that the exception in section 21(4)(d) applies to some or all of the personal information means that disclosure of that information would not be an unjustified invasion of personal privacy. In other words, if section 21(4)(d) applies, the information is not exempt under section 21(1).<sup>23</sup>

[49] The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?<sup>24</sup>

*Parts 1 and 2 – Do the records contain the personal information of a deceased individual and is the requester a "close relative" of that individual?*

[50] I find that Parts 1 and 2 of this test are met in this case. Part 1 is met because, as discussed, the records contain the personal information of the appellant's deceased son. Part 2 is met because the legal definition of "close relative" includes a parent,<sup>25</sup> and it is undisputed that the appellant is the mother of the deceased.

*Part 3 – Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?*

[51] This part of the test is the heart of the dispute between the parties: whether the disclosure of the personal information of the deceased individual is desirable for compassionate reasons, in the circumstances of the appellant's request. I find that it is, for the reasons set out below.

Does the personal information relate to the circumstances of the death of the deceased?

[52] This question is to be distinguished from the more general question in Part 1 of the test (whether the records contain the personal information of a deceased individual).<sup>26</sup> The IPC has held that where information about a deceased individual does

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<sup>23</sup> Orders MO-2237, MO-2245 and MO-2292

<sup>24</sup> Orders MO-2237 and MO-2245.

<sup>25</sup> Section 2(1) of the *Act* (definition of "close relative").

<sup>26</sup> See, for example, Orders PO-3117, PO-2850, MO-2337, MO-2387, and MO-3713

not relate to their death, disclosure is not desirable for compassionate reasons.<sup>27</sup>

[53] Here, I have already found that the personal information of the deceased is about the circumstances surrounding his death.

Giving weight to a request for information sought on compassionate grounds

[54] The appellant seeks the records on compassionate grounds, and in contemplation of a lawsuit against the ministry and her son's company.

[55] In Order MO-2245, the IPC recognized that:

Losing a loved one is a sad and difficult process. Section 14(4)(c)<sup>28</sup> of the Act was designed to **allow families to have the records they feel they require** in order to grieve in the way they choose [emphasis added].<sup>29</sup>

[56] This office has long recognized that after the death of an individual, that person's spouse or close relatives are best able to act in their own "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. Therefore, I give significant weight to the appellant's reason for seeking the records at issue. Her husband's consent to the release of his own personal information contained in the records also weighs in favour of finding that disclosure of the personal information in the records to the appellant is desirable for compassionate reasons.

Do the records at issue provide additional information to that already disclosed? What effect, if any, does the answer to that question have on the application of section 21(4)(d)?

[57] The Legislature intended that a broad and all-encompassing approach be taken to the IPC's consideration of whether or not disclosure is "desirable for compassionate reasons."<sup>30</sup> This office has, accordingly, taken a broad approach in determining whether the disclosure of information in a particular case is "desirable for compassionate purposes."<sup>31</sup>

[58] I adopt this broad approach in considering the third requirement of section 21(4)(d) in the circumstances of this case, especially in regards to the arguments of the

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<sup>27</sup> Order PO-2850.

<sup>28</sup> Section 14(4)(c) is the *Municipal Freedom of Information and Protection of Privacy Act* equivalent to section 21(4)(d) of *FIPPA*.

<sup>29</sup> Order MO-2245.

<sup>30</sup> Orders MO-2237 and MO-2245.

<sup>31</sup> See Orders MO-2237, MO-2245, and MO-2420

ministry and the affected parties that nothing is added to the appellant's knowledge by the disclosure of the records at issue since the transcripts were disclosed to her in full.

[59] The ministry argues that there is no additional information in the records at issue, other than the affected parties' voices. In support of this position, it cites Orders MO-2387 and PO-3212, arguing that the IPC did not order disclosure on compassionate grounds because the information already provided to the appellants in those cases was substantially the same as the information at issue. For the reasons that follow, I do not accept the positions of the ministry and the affected parties, and I distinguish the cases that the ministry relies on.

[60] The argument that the transcripts provide all the information about the death of the deceased contained in the audio records at issue leads to the question of whether the information in the transcripts is the same as that in the records at issue, which are audio recordings.

[61] Although the transcripts were "full" transcripts in the sense that they did not omit portions of the interviews, I do not find that the transcripts offer the same information as the records at issue. Having listened to the records at issue, I find that they offer a more complete understanding of the circumstances surrounding the death of the appellant's son, even if that additional meaning is not significant.

[62] Following the broad and all-encompassing approach to what disclosure is desirable on compassionate grounds, this office has repeatedly recognized that "for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate."<sup>32</sup>

[63] Taking this approach, based on my review of the records, I do not accept the ministry's submission that the only additional information in the audio consists of the voices of the affected party witnesses. Rather, I find that the records at issue complement the text in the transcripts. The most tangible illustration of this is the fact that the transcripts end some answers to the investigator's questions with question marks, particularly in one of the records. Having listened to the audio, I find that it may well provide clarity about the use of the question marks. This additional clarity about the circumstances relating to the death of the appellant's son is additional information about his death that distinguishes it from the text, and may in fact, illuminate the text. I find that disclosing such information is desirable for compassionate reasons.

[64] Given my finding that the records at issue provide very similar, but not the same, information about the appellant's son's death as that already disclosed, I am persuaded to adopt the reasoning in Order PO-3273. In that case, the ministry involved had also

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<sup>32</sup> Order MO-2237

provided a significant amount of information about the accident that took the appellant's son's life (and then made further access decisions). The driver of the other vehicle gave written consent to share his personal cellular phone number, but did not want to share his statement "for personal reasons." The appellant parent in that case desired the records to better understand how his son died. In Order PO-3273, the ministry involved took a similar position to the one in this case: the appellant had already received the majority of the responsive records, including detailed factual information about the fatal accident, and that through severance of the records, the ministry was protecting the affected party's privacy rights.

[65] The adjudicator in Order PO-3273 found that those reasons for not providing greater disclosure reflected the "[ministry's] own views, rather than the appellant's, about what information may assist the appellant and his family in grieving the loss of their son in the way they choose." She also stated that "this is not the correct approach to take in assessing what disclosures are compassionate in the circumstances," to allow an institution (or this office) "to impose its own views on disclosure."<sup>33</sup>

[66] Adopting and adapting the reasoning in Order PO-3273 to this case, I find that the reasons that the affected parties and the ministry have given for withholding the records reflect their own views of what information may assist the appellant in grieving the loss of her son. I have already found that the records at issue offer a more nuanced understanding of the transcripts, and complement them. As the IPC repeatedly noted, the purpose of section 21(4)(d) is to "increase the amount of information provided to bereaved family members", recognizing that "for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate."<sup>34</sup>

*Distinguishing this case from Orders MO-2387 and PO-3212*

[67] In addition to my finding that the records at issue provide some different information from what is discernable from the transcripts, I must also address the ministry's submissions about the relevance of Orders MO-2387 and PO-3212 to this appeal. The ministry argued that in those cases, which also involved appellants who were the parents of deceased children, section 21(4)(d) did not apply because the parents had already received the same information in other forms. Based on my review of those orders and the records in this case, I disagree that the findings in those orders are applicable here, and decline to follow those cases. Several aspects of them are distinguishable from the circumstances in this appeal.

[68] Every situation is unique. In this case, I find that the audio would provide

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<sup>33</sup> Order PO-3273, citing Order MO-2245.

<sup>34</sup> Order MO-2237.

additional possibly useful nuance to the information disclosed, whereas the adjudicators in Orders MO-2387 and PO-3212 did not find that to be the case with respect to the records before them. On the facts before them, those adjudicators found that the disclosure that had been made already (or that they were ordering be made) was sufficient disclosure for compassionate reasons and that the records at issue would not provide additional useful information. One of the records in Order MO-2387 contained "no audible information" about the death of the deceased, "in part because of the emotional state of the affected party" when the record was made,<sup>35</sup> and the other contained "little information" about the death in question. However, in this case, given the facts before me, disclosure of the transcripts alone is not sufficient and the audio provides more information, the disclosure of which is desirable for compassionate reasons.

[69] Moreover, the privacy interests of the affected parties in those appeals were found to be greater in the circumstances of those cases than the privacy interests of the affected parties before me. I discuss the affected parties' privacy interests below.

[70] In summary, the findings in Orders MO-2387 and PO-3212 are highly contextual, and each case involving compassionate grounds is unique. In other cases, such as Orders PO-3273 (discussed above) and PO-3117, disclosure was ordered on compassionate grounds, despite a significant, if not identical, record being in the possession of the requester. The ministry did not discuss such cases to explain why I should not apply similar reasoning to this one. I am persuaded that the reasoning in those cases is more applicable here, given the circumstances before me.

What consideration should be given to the privacy interest of the deceased individual?

[71] One circumstance to consider in determining whether section 21(4)(d) applies is the privacy of the deceased, and the fact that records both contain his personal information.<sup>36</sup>

[72] The parties' representations were not particularly helpful on the issue of the privacy interests of the deceased himself, having taken the position that section 21(4)(d) does not apply to the records at issue.

[73] In weighing any privacy interests the deceased may have with the need for his mother to understand and come to terms with his death, the fact that the records relate to his death and could bring his mother (and father) some additional closure weighs towards disclosure. Although the deceased's privacy is a consideration, I find it is outweighed by the appellant's interest in the records.

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<sup>35</sup> *Ibid.*

<sup>36</sup> Order MO-2237, citing section 2(2) of the *Act* (definition of "personal information").

The personal privacy interests of the affected party witnesses

[74] In addition to considerations pertaining to the appellant and the deceased, I must consider the circumstances relating to the privacy interests of the affected parties who were interviewed by the ministry. That is because their personal information is intermingled with that of the deceased, as previously discussed.

[75] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the "circumstances" to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 21(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d).<sup>37</sup>

[76] The ministry argues that disclosure of the records at issue would cause the affected party witnesses significant personal distress given their consent to the release of the transcripts, but not to the records at issue.

[77] It is reasonable to assume that the death of their employee was distressing to the affected parties, and that the release of the audio interviews in relation to it may be personally distressful to them. However, for the reasons that follow, there is insufficient evidence before me that disclosure of the records at issue would reasonably be expected to lead to significant personal distress, or that these parties had a reasonable expectation of confidentiality when they made the statements.

[78] The affected parties were in the best position to explain whether and why disclosure would reasonably be expected to cause them significant personal distress, but I find that they did not sufficiently do so. As mentioned, they did not provide reasons for their resistance to disclosure apart from their view that the transcripts satisfy disclosure on compassionate grounds. In the alternative, they asked that I "delete" any of their personal information within the records if I order disclosure.<sup>38</sup> In my view, this request, without further information from these parties about any negative effects of disclosure on them, undermines the ministry's submission that disclosure could reasonably result in significant personal distress to them.

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<sup>37</sup> Order MO-2237.

<sup>38</sup> The affected parties did not specify what was meant by "personal information" in this request. The ministry's representations state that the affected parties agreed to the release of the transcripts "except for certain personal information (i.e. address, telephone number, birthdate, driver's licence.)," but that type of information is not in the records. Taking the affected parties' request to "delete" their personal information literally would be absurd on compassionate grounds such as this, since their views or opinions in the records, and the fact of their being part of an investigation, fall under the definition of "personal information" under the *Act*.

[79] I do not accept the ministry's argument that a lack of consent to disclosure necessarily means disclosure would cause significant personal distress. A similar argument was made and not accepted in the case I mentioned above, Order PO-3273. While discomfort with releasing their voices may be a possible reason for withholding consent, the affected parties did not state that. Rather, they stated their belief that the "statutory requirement" for disclosure on compassionate grounds was met. In addition, I note that this office frequently receives representations, often confidentially in such cases, explaining why disclosure would reasonably be expected to lead to significant personal distress. That was not the case here, and in my view, the insufficiency of evidence on this point is a significant consideration.

[80] Furthermore, and quite significantly, I also find that the witness statements contain little of a personal nature about the witnesses themselves, which diminishes from the idea that disclosure could reasonably lead to significant personal distress.

[81] I do not accept the ministry's submission that Order MO-2237 "recognized that a digital recording was sensitive as it reveals the emotional state of an individual," arguing that "the same is true for an audio" recording. Unlike the records in this appeal, the record in Order MO-2237 concerned not only revealed the speaker's voice, but also their image and mannerisms. I am not persuaded that the reasoning in Order MO-2237 is as relevant to a case that does not involve such visual imagery. While their "emotional state" can be said to be reflected to some degree in their intonation and in their voices, I observe that people respond differently to shock, tragedy, and death. There is little in the way of useful conclusions that can be drawn about fault (if any) in connection with the appellant's son's death, or how these affected parties felt about it, from simply hearing their voices and intonation in the records.

[82] The ministry also argues that the affected parties had a reasonable expectation of confidentiality in being interviewed by the ministry, but I am unpersuaded that they did. The affected party witnesses did not address any expectation of confidentiality in their representations, weighing against finding that there was one. From my review of the records, I am not able to discern any express and/or binding assurance of confidentiality. In the circumstances of this case, I find that the affected parties had little choice in the matter of being interviewed by the ministry about the death of the appellant's son, which also weighs against finding that there was an expectation of confidentiality. The ministry cites Order MO-2075 in support of its position that the personal information in the records, having been supplied in the course of a workplace investigation, should be treated confidentially. But Order MO-2075 did not deal with compassionate grounds, so I disagree that it had "similar factors" as this case, and decline to follow it.

[83] Finally, this office has previously considered the expectations of individuals who provide information to investigators where a death is concerned. As noted in Order MO-2237 and other cases, affected parties being questioned about a death "must have been aware that if the [authorities] had determined that there was any evidence of foul



play any agreement as to confidentiality she had with the [authorities] would not have been enforceable.”<sup>39</sup> Given this approach, I also do not accept the ministry’s argument that disclosure in this case would discourage witnesses in future investigations from giving fulsome answers to investigators.

The personal privacy interests of the wife and sister of the deceased

[84] I find that there is minimal personal information of the wife and sister of the deceased in the records, and it is already known to the appellant. I find that any minimal privacy interests these individuals may have relating to disclosure of the records are outweighed by the appellant’s interests in disclosure on compassionate grounds.

***Conclusion***

[85] I have adopted the IPC’s broad approach in considering the third requirement for the application of section 21(4)(d) in the circumstances of this case. I am satisfied that disclosure of the records is desirable for compassionate reasons and therefore does not constitute an unjustified invasion of the deceased individual’s personal privacy or that of the affected parties. In coming to this conclusion, I have weighed the access and privacy interests, as applicable, of the appellant and all the affected parties. I find that any privacy rights and interests that the affected parties have must yield to the appellant’s interests in disclosure for compassionate reasons

[86] Because I have found that the records at issue must be disclosed in their entirety as a result of the application of section 21(4)(d), it is not necessary for me to consider the appellant’s argument that she also requires the records for litigation (see section 21(2)(d) of the *Act*).

**ORDER:**

1. I order the ministry to disclose the records to the appellant, in full, no later than **June 12, 2019**, but no earlier than **June 7, 2019**.
2. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed pursuant to order provision 1.

Original Signed By: \_\_\_\_\_

Marian Sami  
Adjudicator

\_\_\_\_\_  
May 7, 2019

<sup>39</sup> Order MO-2237.

